

***United States Court of Appeals
for the Second Circuit***



APPELLEE'S BRIEF

*Original w/ Affidavit of
Mailing*

75-1076

To be argued by
RONALD E. DE PETRIS

United States Court of Appeals
FOR THE SECOND CIRCUIT

Docket No. 75-1076

UNITED STATES OF AMERICA,

Appellee,

--against--

JOHN R. MARTIN and THEIL TECHNICAL
SERVICES, INCORPORATED,

Appellants.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF NEW YORK

BRIEF FOR THE APPELLEE

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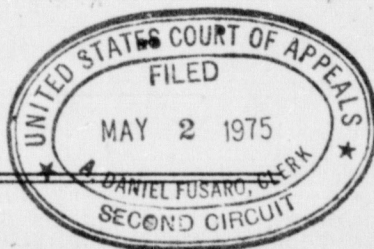


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Preliminary Statement

Appellants John Martin and Theil Technical Services, Inc. (hereinafter "Theil") appeal from a judgment of the United States District Court for the Eastern District of New York (Jack B. Weinstein, *J.*) entered on December 9, 1974, after a jury trial, which judgment convicted Martin and Theil of conspiracy and substantive offenses in violation of 18 U.S.C. § 371 and 41 U.S.C. §§ 51, 54.

Martin, Theil and Robert Rutkowski were charged in indictments 74 Cr. 588 and 74 Cr. 717 with a scheme involving the payment of kickbacks on behalf of a subcontractor, the defendant Theil, to employees of a prime contractor, the Grumman Aerospace Corporation (hereinafter "Grumman"). Each indictment involved a scheme with a different employee of the prime contractor. The two indictments were consolidated for trial. The first indictment

consists of a conspiracy count and four substantive counts. The second indictment consists of a conspiracy count and one substantive count. Martin and Theil were named as defendants in all seven counts. Rutkowski was named as a defendant in the two conspiracy counts and in two of the substantive counts.

The trial proceeded against all three defendants. However, at the conclusion of the trial and prior to the Court's charge to the jury, the defendant Rutkowski pled guilty to Count Two of indictment 74 Cr. 717.* Thereafter the jury found Martin and Theil guilty as charged on each of the seven counts of the consolidated indictments. On December 9, 1974 Judge Weinstein sentenced Martin to a term of imprisonment of two years on each of the seven counts, to run concurrently; the Court directed that Martin serve six months of that term, suspended the balance of the term, and placed Martin on probation for the remainder of the term. The Court further sentenced Martin to a fine of \$5,000 on each count to run consecutively, a total fine of \$35,000. Theil was sentenced to a fine of \$5,000 on each count to run consecutively, a total fine of \$35,000. Execution of all sentences was stayed, and Martin is free on a personal recognizance bond pending this appeal.

Martin and Theil appeal, claiming that there was insufficient evidence to establish beyond a reasonable doubt that the prime contracts were "negotiated" within the meaning of 41 U.S.C. §§ 51-54. Aside from this question, there is no other attack on the sufficiency of the evidence in establishing appellants guilt beyond a reasonable doubt.

* Rutkowski was sentenced to a term of two years, to serve one month in a community treatment center, with the balance of the term suspended and defendant placed on probation for the remainder of the term. The imprisonment was to be at nights only, so that the defendant would be free to work during the day, with weekends and holidays off. Rutkowski was also fined \$10,000. The other three counts against Rutkowski were then dismissed.

Statement of Facts

(1)

John Martin was the President of Theil Technical Services, Inc., a company engaged in the business of preparing technical manuals in connection with the aerospace industry. Robert Rutkowski was the general or operations manager of the corporation. (R. 142-143, 327-328, 487-490, 662, 697.) The instant case involves technical manuals which Theil prepared for Grumman.

Grumman was engaged in the business of designing and manufacturing various aircraft. Over 95% of its business is with the United States Government. In addition to the delivery of the aircraft, Grumman is also responsible for the production of support equipment and technical manuals required for the operation of the aircraft (A. 22a-23a).

The Publications Department of Grumman is responsible for the preparation and delivery of the technical manuals required for the performance of Grumman's contracts with the United States Government. These technical manuals describe the various types of equipment—how each operates, how each is maintained, and how each is repaired. Grumman's Publications Department is broken down into various "programs"—each relating essentially to a different aircraft, and each having a program manager or supervisor responsible for the delivery of the technical manuals for the particular program. Although the Publications Department produces some technical manuals in-house, most of the technical manuals are prepared by various subcontractors pursuant to subcontracts or purchase orders awarded by Grumman. In the latter case, the Publications Department has the responsibility to see that the manuals are prepared in accordance with the requirements of Grumman's prime contract with the Government. (A. 23a-25a.)

There were certain procedures which Grumman followed in the process of awarding a subcontract. When an order came in for a technical manual, the Publications Department would select three qualified subcontractors who would be invited by the Purchasing Department to quote a bid for the job. Then a bid conference was held, at which time the technical requirements for the manual would be reviewed with the three subcontractors. Thereafter each of the three companies would submit its bid, and the purchase order would be awarded to the lowest bidder. (A. 32a-36a.)

(2)

The instant trial involved nine subcontracts or purchase orders awarded by Grumman to Theil for the production of technical manuals required for the performance of Grumman's prime contracts with the United States Navy. Seven of these purchase orders were awarded to Theil as the lowest bidder pursuant to the procedures noted above. The other two were "follow-on" purchase orders involving changes in technical manuals previously produced by Theil, and were awarded to Theil on a "sole-source" basis (A. 36a-51a).

Each of these nine subcontracts was awarded to Theil in connection with a particular prime contract between Grumman and the Navy. All told there were four such prime contracts. Three of these prime contracts were basic ordering agreements for supplies and services, including technical manuals, for various models of aircraft delivered by Grumman to the Navy (A. 38a, 42a, 48a-49a). The fourth prime contract was for the production of eleven model E-2C aircraft, including the delivery of technical manuals with respect to the aircraft (A. 47a).*

* A fifth prime contract was not tied directly to any of the nine subcontracts (A. 100a).

(3)

Olav Andreassen was employed in the Publication Department at Grumman.* He was the program supervisor responsible for the production of technical manuals relating to out-of-production aircraft (R. 147). Sometime during the year 1971 Andreassen and Martin had one or more conversations in which they reached an agreement (R. 151-164). As part of the agreement, Andreassen would "rig" subcontracts to Theil; in return, Martin would pay kickbacks to Andreassen. On any particular subcontract to be rigged to Theil, Martin was to submit a fair estimate of the bid price, and Andreassen would then tell Martin the amount of the kickback he wanted, which would be added on top of the estimate in reaching Theil's bid price. Andreassen would then call the other two bidders and tell them to come in with a bid price higher than the figure Theil was submitting.** (R. 163, 509, 519, 555.)

Pursuant to this agreement Andreassen rigged at least six purchase orders to Theil during the years 1972 and 1973 (R. 164-180, 197-200, 556-557). The amount of the kickback depended on the amount of Theil's bid. It did not exceed 10% of that figure, and Andreassen usually rounded it off to \$1,000. Usually there was a period of delay between the rigging of the subcontract and the actual payment of the kickback—Theil would wait until it had received some money from Grumman for the technical manuals Theil delivered to Grumman (R. 184-185).

* Andreassen was named as a coconspirator, but not as a defendant in Count One of indictment 74 Cr. 588. He had previously waived indictment and pled guilty to a one-count information charging a conspiracy with Martin and Rutkowski involving kickbacks. The Court had imposed a two-year suspended sentence and a \$10,000 fine. (R. 143-146.)

** The other bidders were willing to go along with the rigging of a subcontract to Theil, because they too had an arrangement with Andreassen whereby other subcontracts would be rigged to them (R. 169, 179, 199-200).

In February, May, and again in July 1973 Martin met Andreassen at a restaurant on Long Island, where on each occasion he gave Andreassen a check in the amount of \$1,000. Each check was drawn on the account of Theil, signed by Martin, and made payable to A & D Contractors. A & D Contractors was a company set up by Andreassen, but it did not do any work for Theil. It was used as a conduit for the kickbacks to Andreassen. Andreassen gave false invoices to Martin to cover the checks on Theil's books. (R. 185-196, 556.)

These three checks represent the kickbacks alleged in Counts Two, Three and Four of the indictment. Andreassen was unable to associate any particular check with a particular subcontract; he did however testify that they were given in connection with subcontracts rigged to Theil under prime contracts between Grumman and the Navy (R. 188-189, 192, 195). Later when the defendant Martin took the stand, he testified that all three checks were kickbacks on a particular subcontract rigged to Theil in March 1973 (R. 556).

In September 1973 Andreassen rigged another subcontract to Theil. Andreassen told Martin to add \$1,000 on top of Theil's bid price for the kickback. Andreassen called the other two bidders and told them to bid a figure higher than Theil's. Thereafter Andreassen had several conversations with Martin, in which they discussed the \$1,000 kickback which Martin owed Andreassen and the false A & D invoices.* However payment was put off until January 1974 (R. 201-206, 213, 216-225). On January 7, 1974, Martin called Andreassen and asked him to meet Rutkowski, Theil's

* Shortly after the subcontract was rigged in September, 1973, Andreassen began to cooperate with the F.B.I. Thus the conversations between Martin and Andreassen on October 16 and 31, 1973 were recorded with the consent of Andreassen (R. 202-203, 219, 310-314).

operations manager, the next day. Rutkowski obtained \$500 in cash to pay the kickback by cashing a check drawn on the account of Theil and signed by Martin. Pursuant to Martin's instruction, Rutkowski met Andreassen the next day and gave him the five \$100 bills, which represented half of the \$1,000 kickback owed him on the subcontract he rigged to Theil in September. Andreassen turned the money over to the FBI. (R. 225-228, 319-321, 600, 701.)

This payment forms the basis of Count Five of indictment 74 Cr. 588. Although Martin admitted instructing Rutkowski to pay the kickback, he testified with some confusion that it related to a different subcontract (R. 557-570, 621-625).

(4)

William Sheridan was employed in the Publications Department at Grumman.* He was a business manager responsible for the budget on the program involving model E-2 aircraft, and worked under program supervisor Ragozzine (R. 333-334). Sometime during the summer of 1972 he had a conversation with Rutkowski, who was a friend of his. Rutkowski was aware of the kickback scheme at Grumman, and had gotten the approval from Martin to give kickbacks to Sheridan for any subcontracts awarded to Theil. Sheridan agreed to do what he could for Rutkowski. Martin approved this arrangement. (R. 341-342, 550, 703-704.)

Thereafter, after getting the "OK" from the program supervisor Ragozzine, Sheridan rigged two subcontracts to

* Sheridan was named as a coconspirator, but not as a defendant in Count One of indictment 74 Cr. 717. He had previously waived indictment and pled guilty to a one-count information charging a conspiracy with another subcontractor involving kickbacks. He was sentenced to a fine of \$10,000 and a term of imprisonment of two years, which term was suspended and he was to serve 30 days in a community treatment center (R. 328-333).

Theil in February 1973. Rutkowski and Sheridan agreed that the amount of the kickbacks would be \$1,000 on the larger subcontract, and a trip to the Playboy Club in New Jersey on the smaller subcontract. In March 1973 Sheridan and his wife did go to the Playboy Club with Martin and Rutkowski and their wives. The trip was paid for by checks drawn on the account of Theil and signed by Martin. In July 1973 Sheridan rigged a third purchase order to Theil. Rutkowski and Sheridan agreed on a kickback of \$1,000 with respect to this subcontract (R. 346-368, 435-437, 606-608, 704-706).

Thereafter on a weekend in early December 1973 Sheridan made a social visit to Rutkowski's home. At that time Rutkowski gave Sheridan five \$100 bills as a partial payment of the \$2,000 owed Sheridan as kickbacks on two subcontracts. Martin had approved the payment, and had signed a check drawn on the account of Theil payable to Rutkowski in the amount of \$500 as a vehicle for Rutkowski to obtain the cash to give to Sheridan. (R. 368-370, 438, 608, 706-707.) This payment forms the basis of Count Two of indictment 74 Cr. 717.

A R G U M E N T

The evidence was sufficient to establish that the prime contracts were "negotiated".

An essential element of the crime of paying a kickback in violation of 41 U.S.C. §§ 51 and 54 is that the requisite prime contract be of a kind covered by the statute. *Howard v. United States*, 345 F.2d 126, 129 (1st Cir.), *cert. denied*, 382 U.S. 838 (1965); *United States v. Barnard*, 255 F.2d 583, 588 (10th Cir.), *cert. denied*, 358 U.S. 919 (1958). Accordingly, the Government was required to prove beyond a reasonable doubt that the requisite prime contracts were "negotiated" within the meaning of the statute. Section 52

defines the term. It provides in pertinent part that "the term 'negotiated contract' means made without formal advertising". Appellant contends that as a matter of law the evidence was insufficient to support a finding beyond a reasonable doubt that the requisite prime contracts between Grumman and the Navy were "negotiated".

This contention is frivolous and can be briefly disposed of. The jury's implicit finding that the requisite prime contracts were "negotiated" is amply, indeed overwhelmingly, supported by the evidence. First, there is the general testimony of Grumman's Director of Corporate Audit that, based upon his knowledge of Grumman's aircraft business, its prime contracts with the Navy would be negotiated (A. 29a-31a, 63a-64a, 99a-100a, 110a-111a). Second, at trial a stipulation was entered into that under Item 13 on the face of three of the five prime contracts between Grumman and the Navy there appeared the following (A. 120a-124a) :

This procurement was [] Advertised [X] Negotiated
pursuant to [X] 10 U.S.C. § 2304(a) (10)

[] 41 U.S.C. § 252(c) ;

and on the other two prime contracts there appeared the following (A. 120a-124a) :

This procurement was [] Advertised [X] Negotiated
pursuant to [X] 10 U.S.C. § 2304(a) (14)

[] 41 U.S.C. § 252(c).

10 U.S.C. § 2304(a) (10) and (14) set forth two statutory exceptions to the general requirement that a contract shall be made by formal advertising.

10 U.S.C. § 2310 requires that the findings authorizing negotiations under these statutory exceptions be made in writing. The written findings relating to the five prime contracts between Grumman and the Navy were introduced in evidence. Three of the Navy written findings authorized

certain classes of purchases or contracts, covering three of the five prime contracts involved in this case, to be "negotiated" pursuant to 10 U.S.C. § 2304(a)(10); the other two Navy written findings authorized individual contracts—the remaining two prime contracts involved in this case—to be "negotiated" pursuant to 10 U.S.C. § 2304(a)(14).^{*} (A. 137a, 152a-168a).

Appellants apparently question the reliability of the check marks in the "negotiated" boxes, and refer to the fact that there was not offered in evidence any written certification that the three prime contracts negotiated under § 2304(a)(10) were for property or services authorized by the class determination and findings, required as a condition of use (A. 155a, 160a, 165a) by the Navy findings authorizing certain classes of purchases or contracts to be "negotiated". These contentions do not affect the sufficiency of the evidence. Further, appellants overlook the presumption of regularity which attaches to official proceedings and acts. See 9 Wigmore, *Evidence*, § 2534 (3d Ed. 1940); McCormick, *Evidence*, § 343 at p. 807 (Cleary Ed. 1972). Moreover, appellants introduced no evidence indicating that the prime contracts were not negotiated. Indeed, appellants did not raise this issue in their summation.

Upon this state of the evidence the District Court was fully warranted in submitting this issue to the jury.

^{*} The evidentiary link connecting these five Navy documents to the five prime contracts involved herein was the "stipulation" setting forth the foundation for their admission into evidence (A. 135a-137a). Further, the particular Navy document which related to a specific prime contract was shown by the number of the prime contract writer on the face of the Navy document (A. 142a). While the rather poor reproduction of these Navy documents in the Appendix does not exhibit this number, it was on the documents received in evidence. We will endeavor to have these documents (Ex. 34) available at oral argument for inspection by this Court if it so desires.

CONCLUSION

The judgments of conviction should be affirmed.

Dated: May 2, 1975

Respectfully submitted,

DAVID G. TRAGER,
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RONALD E. DE PETRIS,
*Assistant United States Attorney,
of Counsel.*

STATE OF NEW YORK
COUNTY OF KINGS
EASTERN DISTRICT OF NEW YORK } ss

LYDIA FERNANDEZ

being duly sworn,

deposes and says that he is employed in the office of the United States Attorney for the Eastern District of New York.

two copies

That on the 2nd day of May 19 75 he served ~~copy~~ of the within

Brief for the Appellees

by placing the same in a properly postpaid franked envelope addressed to:

Sutter, Moffatt, Yannelli & Zevin, P.C.

33 Willis Avenue

Mineola, N. Y. 11501

and deponent further says that he sealed the said envelope and placed the same in the mail chute drop for mailing in the United States Court House, ~~225 Cadman Plaza East~~ 225 Cadman Plaza East, Borough of Brooklyn, County of Kings, City of New York.

LYDIA FERNANDEZ

Sworn to before me this

2nd day of May 19 75

JUANITA MAYO
Notary Public, State of New York
No. 24-4501911

Qualified in Kings County
Commission Expires March 30, 1977